

CANADA / JUDGMENT

0706612 B.C. Ltd. v Calibur Facilities Management Ltd.

2006 BCSC 2044

COURT

Supreme Court of British Columbia

DECIDED

17 January 2006

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2006 BCSC 2044 0706612 B.C. Ltd. v. Calibur Facilities Management Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

0706612 B.C. Ltd. v Calibur Facilities Management Ltd.,

2006 BCSC 2044

Date: 20060117

Docket: S70382

Registry: Kelowna

Between:

0706612 B.C. Ltd.

Petitioner

And:

Calibur Facilities Management Ltd.

Respondent

Before: The Honourable Mr. Justice Barrow

Oral Reasons for Judgment

In Chambers

January 17, 2006

Counsel for the Petitioner:

S. Schwartz

Counsel for the Respondent:

K. Watts

Place of Hearing:

Kelowna, B.C.

- [1] THE COURT: This is an application by the petitioner, 0706612 B.C. Ltd., the seller, to have a caveat lodged by the respondent, Calibur Facilities Management Ltd., the purchaser, discharged from title to certain lands. The application is brought under s. 289 of the Land Title Act, R.S.B.C. 1996, c. 250. In addition, the seller is seeking compensation under s. 249 of the Act.

THE FACTS

- [2] The land in question is raw development land, located in the Shuswap area of British Columbia. It is legally described as Lot 1, Plan 13830 K.D.Y.D. In August 2005, the seller agreed to sell the land to the purchaser for \$3.175 million. The purchaser paid a deposit of \$250,000. The balance of the price was due on closing, which the contract stipulated to be October 31, 2005. In addition, the contract provided in para. 12 that:

Time will be of the essence hereof, and unless the balance of the cash payment is paid and such formal agreement to pay the balance as may be necessary is entered into on or before the Completion Date, the Seller may, at the Seller's option, terminate this Contract, and, in such event, the amount paid by the Buyer will be absolutely forfeited to the Seller in accordance with the Real Estate Act, on account of damages, without prejudice to the Seller's other remedies.

- [3] Mr. McCarthy is the sole director and principal of the seller. On October 24, 2004, Mr. Owens, a mortgage broker engaged by the purchaser to secure financing, spoke to Mr. McCarthy and advised him that the purchaser's financing would not be in place by the closing date. He asked if an extension might be available. Mr. McCarthy neither agreed nor disagreed, but indicated that an extension was unlikely.
- [4] On that same day, Mr. Cumming, the realtor acting on behalf of the purchaser, spoke to Mr. Sundby, the realtor acting on behalf of the seller, conveying the same information.
- [5] On the closing date, the purchaser's solicitors forwarded closing documents but did not tender funds. On receiving the documents, the seller's solicitor wrote to the purchaser's solicitor, pointing out that time is of the essence in the contract and advising that if the purchase funds were not paid that day, his client would consider its options. Specifically he wrote:

...our client will consider your client in breach of the contract...and will take such action as our client considers appropriate to enforce its rights under the contract. These options include the right of our client to terminate the contract and accept the \$250,000.00 deposit in account of damages due to your client's breach...

- [6] Also on October 31, 2005, Mr. Cumming sent an amendment to the contract to Mr. Sundby. The proposed amendment would have extended the completion date to November 21, 2005. The seller did not agree to this proposal, but made a counteroffer by which it was prepared to agree to extend the completion date to November 21st, with a new purchase price of \$3.4 million. In addition, the purchaser would have to provide an additional \$250,000 by way of deposit, bringing the total amount of deposit to \$500,000. This offer was not accepted by the purchaser.
- [7] On November 16, 2005, the purchaser provided a further offer by which it proposed that the purchase price be set at \$3.3 million with a completion date of December 15, 2005. The seller did not accept this offer and had his realtor send a form of release, signed by the seller, to the purchaser's realtor, indicating that the original contract was terminated and seeking the purchaser's signature on the document.
- [8] Mr. Cumming acknowledges receiving the release and maintains that it was the first he was advised by the seller that it was contemplating terminating the contract.
- [9] Referring to the release, the purchaser in his affidavit states: "I do not recall seeing a copy of the General Release & Authorization..."
- [10] On November 29, 2005, the seller wrote to the purchaser's realtor in the following terms:
- You were advised that there as another offer being presented to the Seller re: the Shoreline Resort. As discussed a seller's condition was added to the Purchase and Sale agreement, you were advised that your client had until November 28/2005 to show us your intent to purchase the above said property. To date, we have not received confirmation or any further commitment, in light of this; we have decided to proceed with the second offer. Please advise your client accordingly.
- [11] Although the purchaser maintains that neither this letter nor its contents were brought to his attention, Mr. Cumming, his agent, does not deny receiving it. His affidavit is silent on the point.
- [12] Shortly before December 1, 2005, the purchaser's realtor prepared a further draft amendment to the original contract, in which the purchaser offered to pay \$3.55 million for the property and to increase the deposit to \$350,000, with the sale to complete on January 16, 2006. The seller rejected this offer but countered on the same day, offering to sell the land for \$3.65 million with a deposit to be paid directly to the seller, as opposed to being held in trust by the purchaser's realtor, as had been stipulated in the purchaser's proposal. The seller's counteroffer was not accepted.
- [13] By December 1, 2005, all negotiations had come to naught. The purchaser has deposes that:

After this last attempt to agree upon an extension of the Completion Date had failed and given the indication from Mr. McCarthy that the Petitioner either had already entered into or was close to entering into another contract with another buyer...I instructed [my solicitor] to prepare and file a caveat...

[14] There is no evidence that the purchaser, following the seller's rejection of its final offer to secure an extension of the completion date, communicated with the seller in any fashion. The next that the seller learned of the purchaser's continued interest in the proposed sale was when it learned of the filed caveat.

THE LAW

[15] The relevant sections of the Land Title Act are as follows:

282 (1) A person, in this Act referred to as the "caveator", claiming

- (a) under an unregistered instrument which is incapable of immediate registration,
- (b) by operation of law, or
- (c) otherwise,

to be entitled to land the title to which is registered under this Act, may by leave of the registrar, granted on terms, if any, the registrar may consider proper, lodge a caveat with the registrar prohibiting registration of a dealing with the land either absolutely or in the manner or to the extent expressed in the caveat.

(2) A committee or the Public Guardian and Trustee acting under the Patients Property Act may lodge a caveat with the registrar if the committee or Public Guardian and Trustee certifies

- (a) that he or she has been appointed committee or is the committee under the Patients Property Act, and
- (b) that the land of a patient is or may be endangered.

(2.1) A representative acting under an agreement made by an adult under the Representation Agreement Act may lodge a caveat with the registrar if the representative certifies

- (a) that the representative has been authorized under that Act to make decisions about the adult's financial affairs, business or assets, and
- (b) that the adult's land is or may be endangered.

(3) Section 293 does not apply to a caveat lodged under subsection (2), but the registrar may withdraw the caveat

- (a) on receiving a withdrawal notice under section 290, or
- (b) on application by any person, if the registrar considers it proper to do so.

...

286 (1) A caveat may be in the form approved by the director.

(2) A caveat must be verified by the affidavit of the caveator, or the caveator's solicitor or agent and must set out in numbered paragraphs the following:

- (a) a description of the land against which the caveat is to be lodged;
- (b) the nature of the estate or interest claimed;
- (c) the grounds on which the claim is founded;
- (d) an address within British Columbia at which notices may be served.

(3) This section does not apply to a caveat lodged by the registrar.

...

288 (1) As long as a caveat lodged with the registrar remains in force, the registrar must not

- (a) register another instrument affecting the land described in the caveat, unless the instrument is expressed to be subject to the claim of the caveator, or
 - (b) deposit a plan of subdivision or otherwise allow any change in boundaries affecting the land described in the caveat, unless consented to by the caveator.
- (2) An instrument expressed to be subject to the claim of the caveator may be registered or deposited, unless the claim of the caveator, if successful, would, in the opinion of the registrar, destroy the root of title of the person against whose title the caveat has been lodged.

289 (1) An owner or other person claiming an estate or interest in land or a charge, in this Act referred to as the "caveatee", may, before the expiry of the caveat, apply to the Supreme Court and notify the caveator to attend before the court to show cause why the caveat should not be discharged.

(2) The court may,

- (a) on proof that the caveator has been served with the notice, and
- (b) on such evidence as the court may require,

make such order as the court may consider proper.

(3) If a question of right or title is required to be determined, the procedure must be as nearly as may be in conformity with the rules of court.

(4) If a caveat is lodged by the registrar, the application must be heard in the city in which the land title office in question is located.

...

294 (1) If a caveator wrongfully and without reasonable cause lodges or causes to be lodged with the registrar a caveat, the caveator is liable to pay to the person who sustains damage by it such compensation as the Supreme Court considers just.

(2) This section does not apply to a caveat lodged by the registrar.

[16] In *Canada Trustco Mortgage Co. v. 77-II Properties Inc.*, [1986] B.C.J. No. 1550 at p. 2, Skipp L.J.S.C. expressed the test that must be met prior to the court ordering a discharge of a caveat as follows:

A caveat should only be removed if it is patently clear that there is no valid ground for the lodging of the caveat in the first place. If there is a triable issue with respect to the caveator's claim then the caveat must remain.

In broad terms, the issue in this matter is whether this test has been met on the facts as set out above.

[17] When a party to a contract in which time is said to be of the essence breaches that term, the innocent party has an option. That option was expressed by Rose J. in *Danforth Heights Ltd. v. McDermid Bros.*, [1923] 4 D.L.R. 757 (Ont.S.C.). The remarks of Rose J. were adopted by Laskin C.J.C. in *McCauley v. McVey*, [1980] 1 S.C.R. 165. They are to the following effect:

The party not in default has an option: he may elect to keep the agreement in force or he may elect to terminate it. If he elects to keep it in force he cannot afterwards say it [was] terminated on the expiration of the specified time; but that is not because he has effected any variation of it, or because he has "waived" any right to terminate it; it is because he has exercised the right which he had under it.

[18] If the party not in default elects to keep the contract in force, that is, elects to waive his or her right to insist on performance of the contract on the date stipulated, that party has two options. It may give notice to the defaulting party, setting a new date for completion and indicating that time is of the essence in relation to the new date, or it may do nothing, in which case the contract may be completed within a reasonable time (see generally *Rados v. Paconla Investments Ltd.*, 20 R.P.R. 154 (B.C.S.C.)).

POSITION OF THE PARTIES

[19] The purchaser takes the position that there is, at a minimum, a triable issue as to whether the original contract was terminated and, as such, the test for discharging a caveat has not been met. It points to the conflicts in the affidavits of Mr. McCarthy and Mr. Perreault, and similar conflicts in their respective real estate agents' affidavits. It argues that while the seller's solicitor, in his letter of October 31, 2005, made reference to the seller "considering its options," which included an option of terminating the contract, the seller thereafter did not exercise that option, at least not expressly.

- [20] The purchaser argues further that no new date was set by the seller for completion and, as a result, the purchaser had a reasonable time within which to complete, and that time had not expired by December 5, 2005, when the caveat was filed.
- [21] The seller argues that the effect of the negotiations that followed the original completion date was that the original agreement had been terminated and the parties were attempting to agree on new terms of a new contract. Given that new terms were not agreed upon, the purchaser had no contractual right to purchase the lands and thus was not entitled to the caveat that has been registered.

DISCUSSION

- [22] The issue turns on whether, from the course of negotiations that followed the October 31st completion date, it can be said that the seller terminated the original contract, or whether the original contract remained in force, subject only to the setting of a new completion date.
- [23] There is a dispute on the affidavits as to what was said to whom about whether the original contract remained extant. Mr. Perreault deposed that the seller continued to lead him to believe that the original contract remained binding, subject only to the negotiation of a new completion date. He does not, however, point to anything specific in support of that assertion. Moreover, this assertion is at odds with his conduct. He was negotiating not only a new completion date but also a new price and new terms relating to the deposit.
- [24] Mr. McCarthy has deposed precisely the opposite. He maintains that the seller made it clear to the purchaser throughout November that while the property was still for sale, and while it remained interested in selling it to the purchaser, the original agreement was no longer in force, and if there was to be a sale, it would be on new terms, as to price, deposit and completion date. He does not point to any specific document or conversation in support of his contention.
- [25] The conclusions the principals of the parties reached as to the other's intentions were, it appears, based in large measure, if not exclusively, on the exchange of correspondence and documents that occurred during the negotiations subsequent to the passing of the original completion date.
- [26] From these negotiations, the purchaser concluded that the original contract remained in force, although presumably not as to price, deposit or completion date. The seller was of the view that they were negotiating a new contract, although the deposit paid under the original contract would form part of that new contract. Although the seller did not expressly repudiate the contract, that is, it did not expressly elect to terminate it, in my view, that is the only inference to be drawn from the conduct of the parties during the course of the negotiations as set out above.

- [27] It is clear that the seller did not consider itself bound by the sale price, the terms of the deposit, or the completion date, in the original contract following the purchaser's breach. Further, it is clear that the purchaser did not consider that it had a right to insist on the sale price in the original contract, nor to insist on the terms under which the deposit was paid.
- [28] Immediately following the passing of the completion date, the seller's solicitor wrote to the purchaser's solicitor, advising that the purchaser was in breach and that the seller was considering its options. On November 2nd, just two days following the completion date, the seller advised the purchaser that it was prepared to sell the property, but the price would be \$3.4 million with a completion date of November 21, 2005, and the deposit would have to be increased by \$250,000. The necessary implication of this offer was that the seller was no longer prepared to sell the property on the terms of the original contract. While it was not taking the position that the original deposit was forfeited, at least not at that point, it was, in effect, saying that if there was to be a sale, it would be on entirely different terms. That is tantamount to terminating the original contract, in my view.
- [29] The purchaser recognized that the originally agreed upon selling price was no longer binding and that the question of the deposit would have to be revisited. On receiving the seller's new offer, the purchaser did not say, "We have a contract and the selling price is \$3.175 million." Rather, it tendered a counteroffer at \$3.3 million and proposed a completion date of December 16, 2005. Several more proposals were then exchanged but none of them resulted in a new agreement. Ultimately on November 29, 2005, the seller wrote to the purchaser and advised that given that no new contract had been reached, it would be proceeding with an offer received from a third party.
- [30] If, in spite of the foregoing, it might be said that there remained a doubt about the seller's election with respect to the original contract, that doubt was laid to rest when, in mid-November, the seller sent a form of release to the purchaser, indicating that it considered the original contract to be at an end. The fact that the seller continued to negotiate for the sale of the property, after sending the release, is not inconsistent with that election. The seller was, both before and after mid-November, interested in selling the property. Indeed, it was interested in selling the property to the purchaser, albeit on terms to be negotiated.
- [31] Finally, the purchaser's position is otherwise untenable. A contract requires certainty of essential terms. Clearly price, among other things, is an essential term of a contract for the purchase and sale of land. A contract for the sale of land in which the price, the closing date, and the amount and terms of the deposit have not been agreed upon, is no contract at all.
- [32] In the result, I am satisfied that there is no basis for the caveat to remain. I am, in the words of Skipp L.J.S.C., satisfied that it is patently clear that there was no valid ground for lodging the caveat in the first place, and I order that it be discharged.

[33] As to the issue of the claim for compensation, the petitioner asks that it be adjourned generally to permit the parties to address entitlement and quantum, and I order accordingly. I will hear from the parties on the issue of costs when the issue of compensation is dealt with.

Barrow J.

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